IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 23758 of 2005

For Approval and Signature:

HONOURABLE MR.JUS TICE D.A.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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BHAVARSINGH SHOBHAGSINGH RAJPUT & 1 - Petitioner(s)
Versus
SURUCHI HOTELS PVT LTD THRO SMT.PUSHPABEN P.SONARUPAWALA & 25 - Respondent(s)

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Appearance :
MR NM KAPADIA for Petitioner(s) : 1 - 2.
MR TUSHAR MEHTA for Respondent(s) : 1 - 3.
NOTICE SERVED BY DS for Respondent(s) : 4 - 26.

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA

Date : 18/09/2006

ORAL JUDGMENT

1. This petition under Article 227 of the

Constitution of India challenges order dated 10.11.2005 whereunder the application at Exh.159 moved by original plaintiff-applicant came to be rejected and application Exh.167 moved by original defendants- respondent Nos.1,2 and 3 came to be granted.

2. The petitioners herein are the original plaintiffs while respondent Nos.1,2 and 3 are the original defendants. Respondent Nos. 4 to 26 are respectively defendant Nos. 4 to 26, subsequently impleaded in Civil Suit No.123/98 which came to be filed by the plaintiffs seeking specific performance of agreement to sell, executed between the plaintiffs and defendant Nos.1,2 and 3. In application Exh.5 moved by the plaintiffs on 29.04.1998, the trial Court granted ex-parte ad-interim injunction, which is in operation till date. In the meantime, it appears that defendant Nos.1,2 and 3 parted with the suit property in favour of defendant Nos. 4 to 26 and, therefore, various proceedings, including contempt of order

dated 29.04.1998, etc. took place between the parties. The defendant Nos.1,2 and 3 also moved review application, which came to be rejected on 18.10.2005. The plaintiffs moved the trial Court with application Exh.159 seeking appointment of Court Commissioner as it is the case of the plaintiffs that defendants in collusion with each other are putting-up construction on the suit premises despite the order of injunction being in operation. At this stage, defendant Nos.1,2 and 3 moved the application Exh.167 objecting the application moved by the plaintiffs for appointment of Court Commissioner and simultaneously prayed that Exh.5 application should be heard before application Exh.159 for appointment of Court Commissioner is heard by the trial Court. By the impugned order, the trial Court rejected the application Exh.159 moved by the plaintiffs and also granted application Exh.167 moved by defendant Nos.1,2 and 3.

3. Upon notice, defendant Nos.1,2 and 3 have put

in appearance. Though served, there is no appearance on behalf of defendant Nos. 4 to 26. Heard, the learned advocates appearing on behalf of plaintiffs and defendant Nos.1,2 and 3. **RULE.** The learned advocate for defendant Nos. 1,2 and 3 waives service.

4. The grievance on behalf of plaintiffs is that despite order of injunction being in operation the defendants are putting-up construction and to bring this fact on record, appointment of Court Commissioner is necessary. That the trial Court has erred in coming to the conclusion that till the application Exh.5 is not finally decided, no order can be made for appointment of a Court Commissioner.

5. On behalf of defendant Nos.1,2 and 3 the impugned order is supported on the specious plea that by seeking appointment of Court Commissioner, the plaintiffs are trying to delay the hearing of Exh.5 application. It was,

therefore, urged that the defendants are ready and willing to proceed with hearing of Exh.5 application as may be directed by this Court and in the meantime, the impugned order may not be disturbed in any manner whatsoever.

6. As the aforestated facts reveal ex-parte ad-interim injunction came to be granted by the trial Court on 29.04.1998 and defendants, more particularly, defendant Nos.1,2 and 3 have not chosen to move the trial Court for vacating the said injunction. It is only after application Exh.159 was moved by the plaintiffs on 18.10.2005 that defendant Nos.1,2 and 3 approached the Court with application Exh.167 dated 28.10.2005 seeking hearing of Exh.5 application first in point of time. Therefore, instead of blaming the plaintiffs for so-called delay in hearing of Exh.5 application, it is defendant Nos.1,2 and 3 who are required to explain their conduct. To the contrary, it is apparent that they were never seriously bothered about the injunction operating

against them and after inducting defendant Nos. 4 to 26, all the defendants have been flouting the order of injunction made by the trial Court.

7. It is unfortunate that trial Court has not able to appreciate the facts in the right perspective and has made the order which cannot be sustained. In light of the facts which have come on record, to say the least, the impugned order dated 10.11.2005 is not only an order which no reasonable person would have made in the facts and circumstances of the case, but is an order which permits defaulting party to continue to flout the orders of the Court with impunity and the Court itself has become a party to such a practice. This becomes all the more glaring when one takes note of the fact that defendant Nos. 4 to 26 have not chosen to move the Court for prior hearing of Exh.5 application nor have they chosen to appear before this Court despite service of notice. The facts are eloquent enough and the impugned order is made in flagrant violation of

all cannons laid down for exercise of discretionary jurisdiction vested in the trial Court. This Court has proceeded on the footing that the trial Court has merely passed an illegal order in the cause of discharging its juridical duties without any other oblique reason.

8. In the circumstances, the impugned order dated 10.11.2005 cannot be permitted to operate. One more fact requires to be noted that since the impugned order dated 10.11.2005 more than nine months have gone by and there is nothing on record to suggest that defendant Nos.1,2 and 3 have taken any steps to proceed with hearing of Exh.5 application even though, the order of injunction is operating against them. This fact also establishes the malafides of these defendants.

9. The petition is, therefore, required to be allowed. The impugned order dated 10.11.2005 is quashed and set aside and application Exh.159 is

granted. The trial Court is directed to appoint the Court Commissioner and the trial Court in turn shall direct the Court Commissioner to tender his report within a week from the date of his appointment.

10. It will be open to the trial Court to proceed with hearing of Exh.5 application as the learned advocate for defendant Nos.1,2 and 3 has assured the Court that the defendants shall co-operate in proceeding with the said hearing.

11. The petition is, accordingly, allowed, in the aforesaid terms. Rule made absolute. The defendant Nos.1,2 and 3 are directed to bear their own costs and pay costs quantified at Rs.10,000/- to the plaintiffs.

12. The Registry is directed to send a copy of this order to the Principal District Judge,

Surat.

(D.A.MEHTA, J.)

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